Supreme Court, U.S.
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No. 86-1256

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

J. P. JONES, *et al.*,

Petitioners,

v.

CLARK EQUIPMENT COMPANY AND INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT CLARK EQUIPMENT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS RESTATED

I. Whether the Sixth Circuit's holding that class action settlements must be fair, reasonable and adequate to all concerned is consistent with the holdings of this Court and the courts of appeals.

II. Whether the district court's factual determination that the named class representative adequately represented the class should be overturned absent record evidence of an abuse of discretion.

STATEMENT REQUIRED BY RULE 28.1

Clark Equipment Company has no parent company. Its non-wholly-owned subsidiaries and affiliates are: VME Group N.V. (Amsterdam, Netherlands); Transmisiones y Equipos Mecanicos S.A. de C.V. (Queretaro, Mexico); and Productos Industriales Metalicos S.A. de C V. (Queretaro, Mexico).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT CLARK EQUIPMENT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition for certiorari is meritless. Petitioners attach (Pet. App. A) and rely upon the September 2, 1986 opinion of the court below that was subsequently amended upon denial of petitioners' request for rehearing en banc in November, 1986, to clarify the very point about which review in this Court is sought. See *Clark Equip. Co.* v. *International Union, Allied Indus. Workers of Am.*, 803 F.2d 878 (6th Cir. 1986) (*citing Officers for Justice* v. *Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983)). In its amended decision, the Court of Appeals for the Sixth Circuit correctly stated that a district court evaluating a class settlement must ensure that the settlement is

not the product of fraud or collusion and is "fair, adequate and reasonable to all concerned." 803 F.2d at 880. This standard of review, petitioners argue, is "universally" applied by "this Court and virtually every Appellate Circuit in the United States" (Pet. 7). Thus, this case presents no issue appropriate for review by this Court. Further, in requesting review of the wrong decision from the court below, petitioners misrepresent the record. This misrepresentation, considered alone, is sufficient ground for this Court to deny the petition. See Supreme Court Rule 21.5.

Petitioners' fallback contention that the courts below failed to determine that the Union was an adequate class representative similarly misstates the record. The district court, based upon evidence adduced at a fairness hearing on January 21, 1985, explicitly outlined the factors that it considered when certifying the class and then expressly found that the Union was an adequate representative (Pet. App. 41, 43-44). The court of appeals affirmed, and in response to petitioners' contention that the Union lacked standing due to an alleged conflict within the class, stated, "the fact that the Union represented non-union employees did not deprive the Union of standing to represent the class." 803 F.2d at 880. Petitioners' assertion that the Union was an inadequate representative boils down to a request that this Court reevaluate the record evidence to determine whether the Sixth Circuit and the district court abused their discretion in certifying the class, a task this Court does not sit to perform.

COUNTERSTATEMENT OF THE CASE

This case involves a complex class action settlement between Plaintiff-Respondent, Clark Equipment Co. (the "Company") and Defendant-Respondent, International Union, Allied Industrial Workers of America, AFL-CIO (the "Union"). This class settlement was carefully crafted by the parties to address the concerns and needs of each class member; was scrutinized and approved by the district court pursuant to Federal Rule of Civil

Procedure 23; and was held to be fair, adequate, and reasonable by the Sixth Circuit Court of Appeals.

The class settlement resolved the Company's suit, under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to vacate an arbitration award which provided that active and laid off union employees from the Company's Battle Creek plant (including petitioners) could exercise their seniority for competitive purposes after transfer to the Company's non-union Georgetown, Kentucky plant. The arbitrator further held that Georgetown employees should be denied a veto over the Battle Creek employees' exercise of competitive seniority solely because of their non-union status. 803 F.2d at 879 n.1; R.1, Ex. B. On March 12, 1985, after the January fairness hearing at which the Company and Union presented substantial evidence in support of both the settlement (which provided millions of dollars in cash payments to laid off workers and other benefits) and the certification of a proposed class of 1280 defendant employees, the court approved the settlement and certified the class.

On April 9, 1985, petitioners, approximately 50 former Michigan employees who had transferred from the Michigan plant to the Kentucky plant—and who were at all times gainfully employed—appealed the class settlement. In both the district court and the court of appeals, this faction was known as the "Jones Group." Petitioners took their appeal despite their failure to present any evidence at the fairness hearing in opposition to class certification or the proposed settlement. A second group—laid-off employees from the Michigan facility—also appealed the case to the Sixth Circuit. This faction, known as the "Hyslop Group," has not joined in the petition.

On September 2, 1986, the Sixth Circuit issued its opinion upholding both the certification of the class and the class settlement. In November, 1986, the Sixth Circuit denied Petitioners' petition for rehearing, and issued its amended decision. According to the

records kept by the district court, copies of the amended decision were sent to all counsel of record on November 25, 1986.[1] Respondent's counsel received the amended decision on December 1, 1986. Notwithstanding the fact that petitioners filed their petition for certiorari more than two months after the amended decision was issued, petitioners ask this Court to grant the writ based upon the original Sixth Circuit opinion, now withdrawn (Pet. App. B).

ARGUMENT—
REASONS WHY THE WRIT SHOULD BE DENIED

I. The Writ Should Be Denied Because The Decision Below Is Fully Consistent With The Decisions Of This Court And All Other Courts Of Appeals.

The petition is not worthy of this Court's attention. Petitioners attach and rely upon a decision that was withdrawn and amended by the court below to clarify the very issue about which the petitioners now appeal. This misrepresentation of the record, considered alone, requires that the petition be denied. Supreme Court Rule 21.5 provides that "failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

In its amended decision, the Sixth Circuit correctly held that the proper standard for review of a class settlement is a determination that:

> [T]he agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties and that the settlement, taken as a whole is fair, reasonable and adequate to all concerned.

Clark Equip. Co. v. *International Union, Allied Indus. Workers of Am.*, 803 F.2d 878, 880 (6th Cir. 1986) (*citing Officers for Justice* v. *Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982),

[1] A copy of the district court docket sheet showing that the amended decision was sent to petitioners' counsel is attached hereto as Appendix A.

cert. denied, 459 U.S. 1217 (1983)). As petitioners argue (and support with a string of fifteen citations), this standard is "universally accepted" by "this Court and virtually every Appellate Circuit in the United States" (Pet. 7). See generally *Protective Comm.* v. *Anderson*, 390 U.S. 414 (1967).

Petitioners' claim (Pet. 9) that the Sixth Circuit "miscited, misread and incorrectly applied class settlement precedent" is therefore frivolous. The amended decision[2] routinely applies settled principles to the specific facts of this case:

> *[T]here is no evidence that the settlement, taken as a whole, was not fair, reasonable and adequate to all parties concerned.* Intervenors' assertion that the arbitration award was more equitable than the settlement agreement is not a grounds for scuttling an agreement in which both parties, negotiated a settlement in which certain rights (i.e. transfer rights) were traded off for a large monetary award [totalling millions of dollars]. Thus, absent fraud or collusion *and evidence that the settlement on a whole was not fair, reasonable and adequate, this court does not second guess such a settlement.*

803 F.2d at 880 (emphasis added). The decision below does not raise any new or important questions of federal law; nor is the decision in conflict with or inconsistent with the decisions of this

[2]Respondent disagrees with petitioner's assertion that the court applied the wrong standard in its original opinion. To the contrary, the court provided sufficient explication to show that it evaluated the settlement's reasonableness. Although petitioners contend that their objections were not carefully considered, the court decided that its acceptance of the settlement, notwithstanding the objections, was not "an abuse of discretion" (Pet. App. 27). Further, the court observed that the settlement involved a "trade off" of rights for a large monetary award—indeed millions of dollars—and stated that "absent fraud or collusion, this court does not second guess *such a settlement*" (Pet. App. 28) (emphasis added). The plain implication of this language is that *because* the court determined that the settlement was reasonable, it would not overturn the settlement absent fraud or collusion.

Court or any other circuit. Rather, the court of appeals' decision strictly and unexceptionally adheres to settled principles applicable to class settlement cases.

II. The District Court And The Court Of Appeals Correctly Held That The Union Was An Adequate Class Representative.

Federal Rule of Civil Procedure 23(a)(4) requires judicial determination that a named class representative "will fairly and adequately protect the interests of the class." In this case, the district court evaluated the evidence bearing on the adequacy of the Union as the class representative and unequivocally and correctly found that:

> Taking into account the substantial legal issues involved, the substantial nature of the settlement, the precarious financial condition of the [Company], and the likelihood of burdensome and protracted litigation in the absence of settlement; the Court finds that *the defendant Unions have fulfilled their duty of fair representation to the class and have, by entering into this settlement, properly and fairly represented the interests of the class.*

(Pet. App. 41) (emphasis added). The district court later reiterated that "[t]he named Defendants, as representative parties fairly and adequately protected the interests of the class . . . " and observed that "the Defendant class is properly certified here because the relief sought in the Amended Complaint [by the Company] is precisely the opposite sought by the unions in their Answer and Compulsory Counterclaim, and affects the same individuals who would benefit from a Union suit to enforce the [arbitration] award has [sic] the Company not first filed suit to vacate." *Id.* at 43-44. The Sixth Circuit properly upheld this finding based upon the settled abuse of discretion standard.[3]

[3]The "abuse of discretion" standard is routinely applied by all the courts of appeals reviewing class certification and settlement decisions. *Fink* v. *National Sav. & Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985), *cert. denied*, 106 S.Ct. 2896 (1986); *Andrews* v. *Bechtel Power Corp.*, 780

(Footnote continued on following page)

At the fairness hearing in this case, petitioners failed to call a single witness to demonstrate the Union's alleged inadequacy and, accordingly, are themselves responsible for the dearth of evidence upon which the courts below could have ruled in their favor on this issue. It is settled that bare and unsupported assertions, such as those made by petitioners here, are entirely insufficient to demonstrate inadequacy of representation. *New Orleans Pub. Serv. Co.* v. *United Gas Pipeline,* 732 F.2d 452, 472-73 (5th Cir.), *cert. denied,* 469 U.S. 1019 (1984); *Moosehead Sanitary Dist.* v. *S. G. Phillips Corp.,* 610 F.2d 49, 54 (1st Cir. 1979); *Harris* v. *Palm Springs Alpine Estates, Inc.,* 329 F.2d 909, 914 (9th Cir. 1964); *Tasby* v. *Wright,* 109 F.R.D. 296, 298 (N.D. Tex 1985).

Petitioners' argument that the finite amount of the monetary settlement caused conflict among class members is frivolous.[4] Ac-

F.2d 124, 131 (1st Cir. 1985); *West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971); *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 756-57 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974); *Barnett* v. *W. T. Grant Co.*, 518 F.2d 543, 547 (4th Cir. 1975); *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 237-38 (5th Cir. 1982); *Laskey* v. *International Union, UAW*, 638 F.2d 954, 957 (6th Cir. 1981); *Airline Stewards and Stewardesses Ass'n, Local 5550* v. *Trans World Airlines, Inc.*, 630 F.2d 1164, 1167 (7th Cir. 1980), *aff'd sub nom., Zipes* v. *Trans World Airlines, Inc.*, 450 U.S. 979 (1981); *Shapiro* v. *Midwest Rubber Reclaiming Co.*, 626 F.2d 63, 71 (8th Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981); *Hatch* v. *Reliance Ins. Co.*, 758 F.2d 409 (9th Cir.), *cert. denied*, 106 S.Ct. 571 (1985); *Miller* v. *Woodmoor Corp.*, 619 F.2d 65, 67 (10th Cir. 1980); *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir.), *cert. denied*, 107 S.Ct. 274 (1986).

[4]The frivolousness of this contention is particularly acute. The settlement provided petitioners with *greater* benefits than they would have received under the arbitration award which limited their relief to top seniority in the Georgetown plant. What petitioners fail to tell the Court is that those receiving the greatest monetary benefits under the settlement were the same ***unemployed*** individuals, arguably injured by the Company's refusal to permit them to transfer, ***who would have received the greatest amounts under the arbitration award.*** In contrast, at all

(Footnote continued on next page)

knowledging that the same is true of every settlement, courts have long held that a difference in the amount received by various class members is insufficient to defeat class certification. *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3rd Cir.), *cert. denied*, 107 S.Ct. 182 (1986); *Bogosian* v. *Gulf Oil Co.*, 561 F.2d 434, 456 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Blackie* v. *Barrack*, 524 F.2d 891, 909-10 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *Ouellette* v. *International Paper Co.*, 86 F.R.D. 476, 480 (D. Vt. 1980).

In this case, the district court was aware of the petitioners' adequacy concerns when it entered its class certification order. As a result, in its decision, the court carefully outlined the circumstances that led it to conclude the settlement was fair and representation adequate. The court of appeals reviewed and affirmed that decision. There is no evidence that either court abused its discretion. Thus, petitioners' request that this Court embark upon a factual inquiry into the basis for the certification decision is wholly inappropriate.

(Footnote continued from previous page)
relevant times, petitioners, who had been permitted to transfer, were fully employed at the Georgetown facility and consequently suffered no monetary loss. The Sixth Circuit's refusal to give petitioners a windfall is hardly a basis for granting their petition. Furthermore, the record evidence demonstrates that petitioners had sufficient job security under the settlement to ensure their retention on the Georgetown employment rolls into the foreseeable future and were also afforded a $1000 allowance to transfer back to Michigan as well as pension and other benefits.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 4, 1987

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APPENDIX A

Eastern District of Kentucky FILED
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JOHN P. HEHMAN, C.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NOS. 85-5305
85-5339

CLARK EQUIPMENT COMPANY,
Plaintiff-Appellee,

v.

INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA,AFL-CIO, et al.,
Defendants-Appellees,

JAMES PATRICK JONES, et al.,(85-5305),
Intervenors-Appellants,

HYSLOP INTERVENORS,(85-5339),
Intervenors-Non-Party - Appellants.

Before: KEITH and MARTIN, Circuit Judges; and WEBER, District Judge.

J U D G M E N T

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

Copies to. ISSUED AS MANDATE: 11/20/86

COST: none

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Attest:
JOHN P. HEHMAN, Clerk

John P. Hehman
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